185 (2)

No. 10-1012

In The

Supreme Court of the United States

HEATHER DUCASSE,

Petitioner,

v.

STATE OF MAINE,

Respondent.

On Petition For A Writ Of Certiorari To The Maine Supreme Judicial Court

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Petitioner was convicted of manslaughter and operating under the influence. At trial, the chemist who analyzed her blood-alcohol level testified. No one, however, testified directly regarding the possible effect of chemical additives in the blood kit collection tubes on the test result. Instead, the blood kit collection tube manufacturer's written certificate of compliance prepared 18 months before Petitioner committed her crimes was admitted into evidence, after Petitioner stipulated it was a business record. The question presented is:

Whether Petitioner's right of confrontation under the Sixth Amendment was violated by admission of a blood kit collection tube manufacturer's written certificate of compliance prepared 18 months before Petitioner committed her crimes, which she stipulated was a business record.

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RESPONDENT'S BRIEF IN OPPOSITION

Respondent State of Maine respectfully requests that the Court deny the petition for a writ of certiorari seeking review of the decision and judgment of the Maine Supreme Judicial Court, sitting as the Law Court ("Maine Law Court"), issued on November 9, 2010, reproduced in the Appendix to the Petition for Writ of Certiorari ("App.") at 1-9, and reported in *State v. Ducasse*, 2010 ME 117, 8 A.3d 1252.

STATEMENT OF THE CASE

On July 11, 2008, the petitioner, Heather Ducasse ("Ducasse" or "Petitioner") and the driver of a second motor vehicle were involved in a head-on collision. (App. 2). The driver of the other vehicle died as a result of that collision. (App. 2). Ducasse, who was slightly injured, was taken to a local hospital. (App. 2). A blood sample taken from Ducasse there approximately two hours after the accident revealed that Ducasse's blood-alcohol level at that time was 0.19%. (App. 2).

Ducasse was subsequently charged with manslaughter, 17-A Me. Rev. Stat. Ann. § 203(1)(A) (Class A), and operating under the influence, 29-A Me. Rev. Stat. Ann. §§ 2411(1-A)(A), (1-A)(D)(1-A), (5)(D-2) (Class B). (App. 2). She pleaded not guilty to both charges. (App. 2).

Prior to trial, Ducasse informed the State, pursuant to 29-A Me. Rev. Stat. Ann. § 2431(2)(D), Maine's "notice and demand" statute, of her desire to have a qualified witness testify regarding her blood-alcohol test result. (Appendix filed with the Maine Law Court in KEN-10-159 at 5, 12). In response, the State offered testimony at trial from the officer who was present when the blood sample was taken from Ducasse and who later transported the sample to the Maine Health and Environmental Testing Laboratory (MHETL) for testing; a "Certificate of Compliance" issued on December 6, 2006 by BD Diagnostics, the manufacturer of the blood collection tubes used in blood-alcohol kits; and the testimony of Stephen Pierce, the MHETL chemist who analyzed petitioner's blood sample. (Trial Transcript at 578; App. 3, 32).

The certificate of compliance recites that manufacturing specifications require certain amounts of powdered additives in each tube, that the tubes are manufactured specifically for blood-alcohol determination, and that the chemicals added "will not disturb the integrity of the blood sample relative to the alcohol content." (App. 3, 31-33). Ducasse objected to the admission of the certificate on the ground that its admission would violate her Sixth Amendment right to confront the witnesses against her. (App. 3).

Ducasse stipulated to the fact that the substances named in the certificate were anticoagulants and preservatives, but would not stipulate to the fact that those substances were actually present in the tubes used to collect her blood sample. (Trial Transcript at

606-607). After the State had indicated it would be willing to call a witness from the manufacturer, Ducasse stipulated that the certificate of compliance qualified as a business record. (Trial Transcript at 629, 637). The trial court concluded that the statements in the certificate were nontestimonial and admitted the document. (App. 3).

The MHETL approves blood-alcohol kits like the one used in this case. (App. 3). MHETL Chemist Pierce explained that, before those kits are distributed to law enforcement agencies, the lab tests one kit out of every batch of one hundred for the presence of alcohol or other volatiles, and, based on the sample tested from Ducasse's batch, reported that the kit tested contained no alcohol or other volatiles. (App. 3-4). The chemist also testified that Ducasse's blood-alcohol kit was sealed when he received it from the trooper after the blood had been drawn from Ducasse. (App. 4). He described the contents of the blood-alcohol kit, and explained the procedure for testing a blood sample with a gas chromatograph. (App. 4). The chemist explained that the chemical additives represented by the manufacturer to be in the tubes, potassium oxalate and sodium fluoride, were an anticoagulant and an antimicrobial respectively. (Trial Transcript at 608, 638-639). He testified that he had no personal knowledge of the amount of additives in the blood collection tubes, and acknowledged that the amount of additives could affect the reliability of the blood test. (App. 4). Finally, the chemist testified that he certified the result of the gas chromatograph

test and that the result was a reliable and accurate measurement of the alcohol concentration in Ducasse's blood sample. (App. 4).

The jury found Ducasse guilty of both charges. (App. 4). On the count of manslaughter, the court sentenced her to twelve years of imprisonment with all but six years suspended, and four years of probation. (App. 4). On the count of operating under the influence, the court sentenced her to four years of imprisonment, to run concurrently with the manslaughter sentence, a fine of $2100, and a ten-year license suspension. (App. 4).

On appeal to the Maine Supreme Judicial Court sitting as the Law Court ("Maine Law Court" or "Law Court"), Ducasse argued that admission at trial of the blood collection tube manufacturer's certificate of compliance violated her Sixth Amendment right of confrontation because it contained a "testimonial statement" requiring a witness with knowledge regarding the information in the certificate to be made available for cross-examination. (App. 4-5). The Law Court acknowledged that this Court had recently held in *Melendez-Diaz v. Massachusetts,* 129 S.Ct. 2527, 2532 (2009) that the admission of certificates declaring that a forensic analysis had determined that substances found on a defendant were cocaine violated the defendant's right to be confronted with the witnesses against him. (App. 6). The Law Court stated that this Court had distinguished business records from the core class of statements considered to be testimonial, however, stating that they are

generally admissible absent confrontation "because – having been created for the administration of an entity's affairs and not for the purpose of establishing or proving some fact at trial – they are not testimonial." (App. 7, *citing Melendez-Diaz,* 129 S.Ct. at 2538-40).

Distinguishing the forensic test result certificates in *Melendez-Diaz,* the Law Court found in petitioner's case that the manufacturer's "certificate of compliance [wa]s a business record; . . . 'created for the administration of an entity's affairs and not for the purpose of establishing or proving some fact at trial.'" (App. 8).

The Law Court said that the manufacturer's certificate of compliance was not a "sworn certificate[ ] addressing scientific analysis prepared for purposes of a criminal prosecution." (App. 8). The court reasoned that "[b]ecause the certificate does not report the results of a scientific analysis, cross-examination would have little or no practical benefit." (App. 8). Similarly, the court observed that "confrontation would not ensure accurate forensic analysis, 'weed out' incompetent analysis, or provide defendants with an opportunity to explore the analysts' methodologies because the certificate does not report any analysis." (App. 8). For these reasons, the Maine Law Court held that "the statements in the certificate [we]re not testimonial, and that admission of the

certificate did not violate Ducasse's Sixth Amendment right to confrontation." (App. 8).

REASONS FOR DENIAL OF THE WRIT

There is no compelling need for this Court to review the Maine Law Court's decision in this case for several reasons. First, petitioner waived the confrontation issue set forth in her question presented by stipulating to admission of the certificate as a business record. Second, the Maine Law Court, citing this Court's decision in *Melendez-Diaz,* correctly held, as have all the lower courts that have considered the issue, that business records not prepared for trial are nontestimonial. Finally, contrary to the representations in Ducasse's petition, this case does not present the issue presently under this Court's consideration in *Bullcoming v. New Mexico,* 09-10876, because the chemist who actually analyzed petitioner's blood sample testified at trial subject to cross-examination. Accordingly, there is no need for this Court to hold this petition pending its decision in *Bullcoming*. Nor does this case present the issue of whether the Confrontation Clause is violated when raw data is introduced or when an expert testifies regarding the results of a blood test, rather than the chemist who performed the test.

I. By stipulating to admission of the certificate as a business record, Petitioner waived the confrontation issue set forth in the question presented.

Petitioner has waived any claim that her Confrontation Clause rights were violated by the State's failure to call as a witness the person who signed the certificate of compliance. When the State lab chemist started to describe the blood collection tube manufacturer's certificate of compliance (App. 31-33), Ducasse objected on hearsay and confrontation clause grounds, citing *Melendez-Diaz*. (App. 22-25). Initially, the trial court signalled its inclination to sustain the objection, subject to a later complete review of the decision. (Trial Transcript at 604-606). Based on the trial court's indication of its preliminary ruling, the State interjected that it thought it needed to call a witness from the manufacturer, located in Nebraska. (Trial Transcript at 606, 629).

Following the evening recess, the trial court ruled that *Melendez-Diaz* did not preclude admission of the certificate of compliance on confrontation clause grounds. (App. 27). Following that ruling, Ducasse stipulated that the State would be able to lay a sufficient foundation for introduction of the certificate as a business record. (App. 28). The reason for the stipulation, according to Ducasse, was "simply so the witness from Nebraska doesn't have to come here and lay a foundation in a minute and a half." (App. 28).

This Court has held that the Confrontation Clause bars the "admission of testimonial statements of a witness who did not appear at trial unless he was unavailable to testify, and the defendant had had a prior opportunity for cross-examination." *Crawford v. Washington,* 541 U.S. 36, 53-54 (2004). "To be sure, the Clause's ultimate goal is to ensure reliability of evidence, but it is a procedural rather than a substantive guarantee. It commands, not that evidence be reliable, but that reliability be assessed in a particular manner: by testing in the crucible of cross-examination." *Id.* at 61.

Under these circumstances, where the State indicated its willingness to call a witness from the manufacturer to be subject to cross-examination (which is all that confrontation requires), and would have done so but for Ducasse's stipulation, this Court should deem her current confrontation clause claim waived. At the very least, this apparent waiver makes this case a poor vehicle through which to address the meaning of the Confrontation Clause.

II. There is no conflict among the lower courts regarding the Maine Law Court's holding that business records not expressly prepared for use at trial are not subject to confrontation.

This Court has expressly held that business records not specifically prepared for use at trial are not testimonial, and therefore their admission at trial

does not require confrontation. In *Crawford,* the Court stated "there is scant evidence that exceptions were invoked to admit *testimonial* statements against the accused in a *criminal* case. Most of the hearsay exceptions covered statements that by their nature were not testimonial – for example, business records . . . " 541 U.S. at 56 (emphasis in original). In *Melendez-Diaz,* the Court held business records that constitute part of the chain of custody "may well qualify as nontestimonial records." *Id.* "Business . . . records are generally admissible absent confrontation not because they qualify under an exception to the hearsay rules, but because – having been created for the administration of an entity's affairs and not for the purpose of establishing or proving some fact at trial – they are not testimonial." 129 S.Ct. at 2539-40; *See also Michigan v. Bryant*, 131 S.Ct. 1143 n.9 (2011) (observing that certain hearsay evidence, such as business records, is generally considered nontestimonial as it was primarily prepared for purposes other than a prosecution).

Expressly relying on *Melendez-Diaz,* the Maine Law Court held that the blood collection tube manufacturer's certificate of compliance that petitioner takes issue with (App. 31-33) was a nontestimonial business record. (App. 8). The certificate was not prepared for use in petitioner's criminal trial; indeed, it was prepared a full 18 months before petitioner even committed her crimes. In the certificate, the manufacturer has set out the specifications of its product, not unlike any other business or public

record. The author of the certificate, Linette Asay, the company quality assurance person, is not certifying that she performed any analysis in the creation of the product.

The certificate's statement that the chemicals would not "disturb" the integrity of the blood sample relative to the alcohol content – the statement that Ducasse asserts is testimonial – was placed there by the manufacturer merely to reassure any consumer that the kit is appropriate for blood-alcohol analysis. The certificate also states that it complies with a number of federal regulations required for interstate sale of a product that contains chemicals. This is far removed from the certificate of analysis prepared to substitute for an analyst's live testimony that this Court considered testimonial in *Melendez-Diaz*.

All courts considering the issue have held, as did the Maine Law Court, that *Melendez-Diaz* does not require live testimony from *all* individuals who had *any* role in preparing the apparatus, chemicals, or samples the testifying analyst used to conduct the test. *See United States v. Christie,* 2009 WL 4499124 (E.D.Va. 2009) (allowing certificate of accuracy of an intoxilyzer and certification of tuning forks); *State v. Fitzwater,* 227 P.3d 520 (Haw. 2010) (speed check card prepared five months before trial attesting to accuracy of officer's speedometer could be admissible as nontestimonial business record if proper foundation is laid); *Oregon v. Bergin*, 217 P.3d 1087 (Or. App. 2009) (allowing use of certificate that intoxilyzer is accurate); *New York v. Lent*, 908 N.Y.S.2d 804 (N.Y. 2010)

(allowing as a business record the certificate of simulator solution used with an intoxilyzer); *see also North Dakota v. Geitzen*, 782 N.W.2d 66 (N.D. 2010) (allowing use of a certificate for nurse's role in blood draw when the officer and the analyst testify). Notably, Ducasse does not identify any conflict among the lower courts regarding the issue the Maine Law Court actually addressed.

III. Contrary to the representations in Ducasse's petition, this case does not present the issue presently under this Court's consideration in *Bullcoming v. New Mexico*, 09-10876, and does not present the issues of whether the Confrontation Clause is violated when raw data is introduced or when an expert testifies regarding the results of a blood test, rather than the chemist who performed the test.

Ducasse, while correctly observing that this Court has under consideration the case of *Bullcoming v. New Mexico*, 09-10876, in which the Court will decide whether a lab analyst's supervisor may testify at trial in lieu of the analyst who actually conducted the test without running afoul of the Confrontation Clause, incorrectly represents in her petition that this case squarely presents the related issue of whether an expert who testifies about lab test results based on raw data prepared by another is providing a "testimonial" statement. Petition at 4-11. On the contrary, Ducasse's case is distinguishable from both

Bullcoming and *Melendez-Diaz* in that the forensic chemist who actually analyzed petitioner's blood sample testified subject to cross-examination at trial.

Moreover, this case is further distinguishable from *Bullcoming* and *Melendez-Diaz* in that the "raw data" at issue, the blood collection tube manufacturer's certificate of compliance, was prepared over 18 months before petitioner committed her crimes. Ducasse stipulated that it was a business record, and, unlike the forensic reports in *Bullcoming* and *Melendez-Diaz,* it was not prepared for the specific purpose of substituting for live testimony at petitioner's trial.

Accordingly, there is no reason why this Court should hold this petition pending its forthcoming decision in *Bullcoming* since this case simply involves admission of an ordinary business record not prepared for use at trial, and because it does not involve having a supervisor testify as a substitute for the testing analyst. Nor does this case involve either introduction of raw data, or an expert's testimony about raw data instead of having the testing analyst testify.

CONCLUSION

For the foregoing reasons, this Court should deny the petition for a writ of certiorari.

Dated at Augusta, Maine this 31st day of March, 2011.

Respectfully submitted,

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